

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL JAMES WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

June 14, 2005

No. 252540

Wayne Circuit Court

LC No. 03-008245-01

Before: Talbot, P.J., and Zahra and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant of carrying a concealed weapon, MCL 750.227; felon in possession of a firearm, MCL 750.224f; and possession of a firearm while committing a felony (felony-firearm), MCL 750.227b. The trial court sentenced him to a mandatory five years' imprisonment for his second felony-firearm conviction, and three years' probation for his carrying a concealed weapon and felon in possession of a firearm convictions, to be served concurrently. Defendant appeals as of right. We affirm.

I. Ineffective Assistance of Counsel

Defendant first argues that he was denied the effective assistance of counsel based on defense counsel's failure to investigate and subpoena two persons listed as potential defense witnesses. We disagree.

A. Standard of Review

Defendant preserved his claim of ineffective assistance of counsel by moving for a new trial based on ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's finding of fact are reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.*

B. Analysis

To establish a claim for ineffective assistance of counsel, defendant must show, with regard to counsel's performance "that counsel made errors so serious that counsel was not

functioning as the ‘counsel’ guaranteed by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *LeBlanc, supra* at 578.

1. Lisa Barksdale

Regarding defense counsel’s failure to interview and subpoena Lisa Barksdale, the lower court record does not reflect how she would have testified at trial. Without this evidence, this Court cannot determine whether Barksdale’s testimony would have affected the outcome of trial. Therefore, defendant has failed to prove that defense counsel’s failure to interview or call Barksdale as a witness prejudiced the defense. *LeBlanc, supra*.

2. Christopher Bibb

Regarding defense counsel’s failure to interview and subpoena Christopher Bibb, we conclude defendant has failed to show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment. *LeBlanc, supra*. In *People v Tommolino*, 187 Mich App 14, 17-18; 466 NW2d 315 (1991), this Court stated that:

With regard to trial counsel’s failure to interview the alibi witnesses prior to trial and, more importantly, trial counsel’s failure to subpoena those witnesses, the issue becomes somewhat more problematic. On the one hand, we think it would have been reasonable for trial counsel to have served a subpoena on the witnesses to ensure their presence at trial or, at least, to bolster his request for an adjournment upon the witnesses’ failure to appear at trial. On the other hand, the trial court raises an important point that defendant has an obligation to assist in his own defense and that it is to some extent reasonable for trial counsel to have relied on defendant’s representations that he would secure the presence of the witnesses. Under these circumstances, we cannot conclude that trial counsel’s failure to secure the presence of the witnesses at trial by itself constitutes ineffective assistance of counsel.

Here, defendant testified that he asked Bibb to testify, and that Bibb replied that he would. Based on defendant’s representation to defense counsel that Bibb would testify favorably, i.e., that defendant did not possess the gun, defense counsel listed Bibb as a defense witness. Although defendant testified that he believed defense counsel would arrange for Bibb to testify, the trial court found that defendant told defense counsel that he would arrange for Bibb to be at trial. The trial court’s finding is not clearly erroneous. Defense counsel testified that defendant told him that Bibb and Barksdale “would come at his request.” Further, the record indicates that when Bibb was not present on the first day of trial, defendant did not suggest to defense counsel that Bibb would not voluntarily testify. Rather, defendant lead defense counsel to believe that Bibb could just be picked up during lunch. Because defense counsel reasonably relied on defendant’s representations that Bibb would voluntarily testify at trial, defendant has failed to show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” *LeBlanc, supra*.

II. Failure to List Res Gestae Witnesses

Defendant next argues that the prosecutor's failure to list res gestae witnesses known to law enforcement constitutes error requiring reversal. We disagree.

A. Standard of Review

Whether to grant new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *People v Jackson*, 467 Mich 272, 277; 650 NW2d 665 (2002), citing *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

B. Analysis

MCL 767.40a provides, in pertinent part, that:

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.

The "purpose of 'listing' requirement in res gestae witness statute is merely to notify the defendant of the witness' existence and res gestae status." *People v Gadomski*, 232 Mich App 24, 36; 592 NW2d 75 (1998), citing *People v Calhoun*, 178 Mich App 517, 523; 444 NW2d 232 (1989). Here, defendant knew the existence of the persons present at the scene, and knew that there were potentially res gestae witnesses. "A res gestae witness is a person who witnesses some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts." *Gadomski*, *supra* at 33 n 3 (citation omitted). Despite defendant's knowledge, he did not request reasonable assistance under MCL 767.40a(5). If "the defendant knew of the res gestae witness in any event, the prosecutor's failure to list the witness would be harmless error." *Calhoun*, *supra*. Here, defendant knew of persons present at the scene, and thus, any error in not listing them as res gestae witnesses, is harmless.

III. Evidence Admitted in Violation of *Miranda*¹

Defendant next argues that the trial court erred in allowing Officer Robson to testify to defendant's in-custody statements. We disagree.

A. Standard of Review

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

“On appeal from a ruling on a motion to suppress evidence of a confession, deference is given to the trial court’s findings. The record is reviewed de novo, but an appellate court will not disturb the trial court’s factual findings unless they are clearly erroneous.” *People v Harris*, 261 Mich App 44, 53; 680 NW2d 17 (2004), citing *People v Kowalski*, 230 Mich App 464, 471-472, 584 NW2d 613 (1998).

B. Analysis

The safeguards adopted in *Miranda* apply only where there is a custodial interrogation; further, ‘interrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.’ [*People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998), quoting *People v Anderson*, 209 Mich App 527, 532-533, 531 NW2d 780 (1995), citing *Rhode Island v Innis*, 446 US 291, 301, 100 S Ct 1682, 64 LEd2d 297 (1980).]

At trial, officer Robson testified:

Officer Robson. Well, first I asked [defendant] if he had a CCW permit. If he has a permit to carry it –

* * *

[objection]

* * *

The Prosecutor. You asked him --?

Officer Robson. Did he have a CCW permit, because if he had a permit to carry it, then there’s no crime. And he replied no. And at that point , I recorded some information off the vehicle, as far as the plate number. And we drove off on our way to the precinct, and at that point Mr. Washington just began pleading with me. He started saying please don’t take me to jail, I just got out of jail and if I catch a gun case I’m going back for sure. And from where we were making the arrest back to the precinct it’s maybe about a two mile drive and in normal traffic maybe about five minutes or so. And pretty much from the whole time leaving there to get to the precinct he was pleading. And repeatedly saying if I go back, I’m going to get time for sure.

Defendant argues the trial court erred in allowing into evidence his admission that he did not have a CCW. The trial court, citing *Rhode Island v Innis*, 446 US 291, 100 S Ct 1682 64 L Ed 2d 297 (1980), held that officer Robson’s question was not intended to elicit an incriminating response, and therefore *Miranda* did not apply.

In *Innis*, the court stated that, by “‘incriminating response, we refer to any response--whether inculpatory or exculpatory--that the prosecution may seek to introduce at trial.” *Innis*, *supra* at 301 n 5. The *Innis* court further noted:

“No distinction can be drawn between statements which are direct confessions and statements which amount to ‘admissions’ of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely ‘exculpatory.’ If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.” [*Innis*, *supra*, quoting *Miranda*, *supra* at 476-477.]

Here, because the prosecution sought to introduce defendant’s admission that he did not have a CCW at trial, we conclude officer Robson’s question elicited an “incriminating response” under *Innis* and *Miranda*.²

However, the testimony is harmless error beyond a reasonable doubt. In *People v Swan*, 56 Mich App 22, 33, 223 NW2d 346 (1974), this Court stated:

We must determine ‘whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,’ that is, whether it might have aided in convincing an otherwise undecided juror of the defendant’s guilt beyond a reasonable doubt. If it is reasonably possible that, in a trial free of the error complained of, even one such jury member might have voted to acquit the defendant, then the error was not harmless, and the defendant must be retried. If, on the other hand, ‘the proof was so overwhelming, aside from the taint of the error, that all reasonable jurors would find guilt beyond a reasonable doubt,’ then the conviction must stand.

Here, there is no reasonable possibility that officer Robson’s testimony, that defendant did not have a CCW permit, aided the jury in deciding whether defendant possessed the gun. Indeed, defendant not having a CCW permit just as likely indicates that he did not have possession of the gun. Moreover, evidence relating to defendant’s possession of the gun was not tainted by officer Robson’s testimony that defendant did not have a CCW permit. The evidence of defendant’s possession at trial consisted of officer Robson observing defendant discard a gun

² In its brief on appeal, the prosecution concedes that “Robson’s intent in asking the question was to elicit information that he believed was incriminating.”

under a parked vehicle. Because any error is harmless beyond a reasonable doubt, reversal is not required.

Defendant next challenges his statements to police officers pleading not to be arrested. The trial court found these statements were not made in response to police questions, and that *Miranda* did not apply. We agree with the trial court. The lower court record indicates that defendant spontaneously made these statements without being prompted by police questions. Accordingly, there is no *Miranda* violation.

IV. Cumulative Error

Defendant last argues that the trial court erred in denying his motion for a new trial based on the cumulative affect of errors. We disagree.

A. Standard of Review

Whether to grant new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of discretion. *Cress, supra*.

B. Analysis

Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to error requiring reversal. *People v Morris*, 139 Mich 550, 563; 362 NW2d 830 (1984). “‘Cumulative error,’ properly understood, actually refers to cumulative unfair *prejudice*, and is properly considered in connection with issues of harmless error.” *LeBlanc, supra* at 592 n 12 (emphasis in original). Here, no error resulted in unfair prejudice to defendant, and therefore, there is no cumulative effect of unfair prejudice. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio